To this the obvious answer is that the cause of such a result lies in a defect of our jury system and not in the law, that such an objection is applicable to any succession of civil suits, and that there is no more reason to establish an artificial standard of care in the given case than in any other.

The Arkansas authorities are of the opinion that they can conceive of no other way of determining what ordinary care is than by ascertaining what men of prudence do in like circumstances.[17] This ignores the possibility of expert testimony from well-informed railroad men and would be a rather negligible objection.

It remains to be noticed that the Supreme Court of the United States has held that such an instruction as that asked for in the principal case should have been given and it was even decided that the defendant was entitled to a pre-emptory instruction in his favor,[18] but in that case it appeared that the evidence tended slightly to show that the unblocked frog which was used was better than the blocked one under the particular circumstances.

On the whole we adhere to the rule of the principal case. It is common knowledge that many customs widely adopted are productive of unfortunate results. Allowing one to justify himself for his own carelessness by setting up the carelessness of others is to our mind contrary to reason and justice.

PUBLIC USE IN EMINENT DOMAIN.

Eminent domain is the right of a sovereignty to take private property for public use.[1] The holdings of the courts as to what constitutes a public use resolve themselves into two classes:[2] one, adhering to a strict construction, holding that a use or right of use on the part of the public is an essential element;[3] the other, the more liberal view, holding that great public utility or benefit

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[17] *Kansas T. Coal Co. v. Brownlie,* 60 Ark., 582.

[18] *Southern Pac. R. Co. v. Seley,* 152 U. S., 145.

[1] *Hale v. Lawrence,* 21 N. J. Law, (1 Zab.) 714, 728; *Groff v. Bird-in-Hand Turnpike Co.,* 128 Pa. St., 621, 5 L. R. A., 661.

[2] 10 Am. & Eng. Ency., 1062; *Lewis on Eminent Domain* (3d Ed.), sec. 257.

[3] *Brown v. Gerald,* 100 Me., 351; *Board of Health v. Van Hoesan,* 87 Mich., 533; *Scudder v. Trenton Delaware Falls Co.,* 1 N. J. Eq., 694; *Varner v. Martin,* 21 W. Va., 534.

may constitute a public use.[4] Both of these views are open to criticism. Under the strict view it is impossible to develop the natural resources of the state except by public corporations. Unless manufacturing concerns can exercise the right of flowage, the water power of the smaller streams cannot be utilized.[5] Unless land can be condemned for irrigation purposes large districts must remain non-productive.[6] The second view, holding that public use is co-extensive with public welfare seems too broad. The difficulty in adopting this rule is brought out by Chief Justice Cooley in the case of *Ryerson v. Brown,*[7] where he said, in repudiating the rule, that every lawful business in a sense confers a public benefit. Under this rule the courts have no fixed principle to guide them, but must use their own discretion in each individual case in deciding whether the benefit to the public is sufficient to justify the exercise of eminent domain.[8]

The Connecticut Supreme Court in the recent case of *The Connecticut College for Women v. Calvert*[9] defines public use as a use governmental in its nature, and one in which the public has or can acquire a common right on equal terms to the use or benefit of the property taken, except only that the use or right of use by the public may be dispensed with when a public benefit results which cannot otherwise be realized, and which continues to exist although the public has no use or benefit of the property taken. This rule seems to cover practically all of the cases in which eminent domain has been granted, and is free from the objections to the other rules given. The exception permitting the taking when a public benefit results which cannot otherwise be realized, permits the utilization of natural resources and justi-

[4] *Olmstead v. Camp,* 33 Conn., 532; *Talbot v. Hudson,* 16 Gray (Mass.), 417; *Matter of Townsend,* 39 N. Y., 171; by public use is meant for the use of many or where the public is interested, *Seeley v. Sebastian,* 4 Oregon, 25.

[5] *Camp v. Olmstead, supra; Talbot v. Hudson, supra.*

[6] *Rialto Irrigation Dist. v. Brandon,* 103 Cal., 384; *Ellinghouse vc. Taylor,* 19 Mont., 462; *Shoemaker v. Hatch,* 13 Nev., 261; *Umatilla Irrigation Co. v. Barnhart,* 22 Oregon, 389.

[7] 35 Mich., 332.

[8] The existence of a public use so largely depends upon the peculiar circumstances and conditions surrounding the locality in which the case arises, that no definite rule can be laid down in regard to it. *Clark v. Nash,* 198 U. S., 361, followed in *Baillie v. Larson,* 138 Fed., 177.

[9] 88 Atl., 633.

fies the earlier Connecticut cases granting the right of flowage.[10] It sufficiently safeguards private property rights by prohibiting taking for public use generally, and only permitting the taking when the benefit to the public could not otherwise be realized or where the public has a right to the use or benefit.

Although all the earlier Connecticut decisions, allowing the exercise of eminent domain can be brought under this rule, the rule followed in those cases was the broad definition of a public use as a public benefit or as a great public utility.[11] The court has in this case, therefore, narrowed the former doctrine.

The question before the court in this case was whether a legislative grant of the right to exercise eminent domain to the Connecticut College for Women, owned and controlled by a private corporation, was constitutional. The court held, Wheeler, J. dissenting, that such a grant was unconstitutional, since the charter of the college, stating that its purpose was the higher education of women, did not state that the public generally had the right to enjoy the benefits of the college. As stated in the opinion, the question whether universities and colleges when owned and controlled by private corporations administer a public use so as to justify a grant of eminent domain to them has apparently never been before the courts.

Under the broad definition of a public use such a grant would seem justifiable. Such was evidently the opinion of Governor Baldwin, former Chief Justice, when he signed the bill. Under the definition given by the court the holding is clearly sound. The charter of the college[12] by not stating that the public have a common right upon equal terms, leaves it to the corporation to fix any limitations upon admittance it may see fit. Nor does it appear that the existence of the right of eminent domain is essential to the life of the college.

REVOCATION OF FRANCHISE BY MUNICIPALITY.

By a division of five to four the Supreme Court of the United States in the case of *City of Owensboro v. Cumberland Telephone & Telegraph Company*[1] recently affirmed the doctrine of

[10] *Olmstead v. Camp, supra; Austin v. Todd,* 34 Conn., 78.

[11] *Bradley v. Railroad Co.,* 21 Conn., 294; *Olmstead v. Camp, supra; Austin v. Todd, supra; Railroad Co. v. Offield,* 77 Conn., 417, 421.

[12] 16 Sp. L. Conn., 1911, p. 101.

[1] 33 Sup. Ct. Rep., 988.